Supreme Court, U.S.
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No. 95-1038

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1995

LEMOND CONSTRUCTION COMPANY,

Petitioner,

v.

RICHARD WHEELER,
ADMINISTRATOR OF THE ESTATE OF
CHRISTOPHER GENE WHEELER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

# REPLY BRIEF

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## LIST OF PARENT COMPANIES OR NONWHOLLY OWNED SUBSIDIARIES

There are no parent companies or nonwholly owned subsidiaries of Lemond Construction Company.

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## ARGUMENT

Respondent Wheeler does not distinguish this $3.5 million punitive damage award to punish for simple negligence from the intentional fraud judgments of BMW of North America v. Gore, No. 94-896; Browning-Ferris Industries of Vermont, Inc. v. Kelco, 492 U.S. 257 (1989); TXO Production Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993); Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991); and Life Insurance Co. of Georgia v. Johnson, No. 1940357 (Ala. Nov. 17, 1995). Rather, Wheeler has raised a number of procedural and factual arguments that do not answer Lemond's brief. True, this is an Alabama problem since it is the only jurisdiction to impose punitive damages for simple negligence. However, this scheme deprives all defendants, whether automobile drivers, physicians, contractors, manufacturers, or others, of due process when sued for wrongful death.

### I. REVIEW BY THIS COURT IS REQUIRED TO VINDICATE A FEDERAL RIGHT WHICH HAS BEEN DENIED BY THE DECISION BELOW.

Wheeler fails to address the decisions of this Court, cited in Lemond's brief, which conflict with the imposition of punitive damages for simple negligence. Instead, Wheeler first claims that the Supreme Court of Alabama did not base its decision on any federal constitutional issues. In actuality, the majority of justices on the Supreme Court of Alabama merely elected to ignore the important federal constitutional issue presented by contending it had not been raised with "the specificity required in order for this Court to address it," citing Ala. R.

App. P. 28(a)(5) (App. at A-17).[1] Justice Maddox pointed out in his concurring opinion that this assertion was patently incorrect, and proved it by reprinting in his opinion the four-page section of Lemond's brief to the Supreme Court of Alabama in which the issue was clearly and specifically raised. This section of the brief was headed with the statement: "DEFENDANTS SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS, AS WELL AS OTHER CONSTITUTIONAL RIGHTS, WERE VIOLATED BY THE IMPOSITION OF A $3,500,000 PUNITIVE DAMAGES VERDICT FOR SIMPLE NEGLIGENCE WITHOUT APPORTIONMENT BASED ON DEGREE OF CULPABILITY AND WITHOUT ADEQUATE STANDARDS FOR REVIEW" (App. at 23-24). The argument within this section of the brief cited the due process clause of the fourteenth amendment and this Court's opinion in Haslip, as well as the dissenting opinions in several Alabama decisions which had discussed the impropriety of assessing punitive damages for acts of simple negligence. Lemond also attached copies of the fifth and fourteenth amendments.

Contrary to Wheeler's assertions, this Court plainly has the authority to

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[1]Ala. R. App. P. 28(a)(5) states:

(a) Brief of the appellant. The brief of the appellant shall contain under appropriate headings and in the order here indicated:

. . . .

(5) An argument (The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on)[.]

review any case arising from a state court in which a federal issue was timely raised and pressed in the state court, regardless of how the matter was resolved below. The Supreme Court's jurisdiction does not depend on whether the state court addressed the question; it is enough that a federal claim was made, and not accepted. See, Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986) (motion to recuse a justice formed the basis of a due process appeal in this Court despite fact that it was not addressed by Alabama Supreme Court); see also Illinois v. Gates, 462 U.S. 213, 218 n.1 (1983); McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434-35 (1940); New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928). Moreover, this Court makes the decision as to whether the constitutional issue was adequately raised below. In Taylor v. Illinois, 484 U.S. 400, 406 n.9 (1988), the Court rejected the argument that the Court should decline jurisdiction because petitioner's sixth amendment claim had not been adequately presented to the state courts. The Court examined petitioner's brief before the Illinois Court of Appeals and found petitioner had raised the claim by virtue of citations to court decisions in which the issue was addressed. Despite the fact that the issue had not been addressed or even directly presented to the state courts, the Supreme Court agreed to resolve the issue.

The issue before this Court was squarely presented to the trial judge before, during, and after trial (App. at 53, 55, 57-59), and was specifically raised in the brief to the Supreme Court of Alabama (App. at 23-31), a fact acknowledged by Justice Maddox of that court (App. at 23). There can be no question

but that this Court has the jurisdiction under 28 U.S.C. § 1257 to resolve the important due process issue presented.

II. THE CASE WAS SUBMITTED TO THE JURY ON A THEORY OF SIMPLE NEGLIGENCE WHICH ALLOWED ONLY PUNITIVE DAMAGES AS WELL AS ON A THEORY OF WANTONNESS.

Wheeler has misled this Court in arguing that the courts below concluded that Lemond was found to have acted with other than simple negligence (Brief in Opposition at 15, 16). The lower courts did not make such a finding. Wheeler introduced some evidence which could be characterized as showing something other than simple negligence. The veracity and reliability of this evidence was strongly disputed.[2] Simply stated, the trial court and the Supreme Court of Alabama found only that there was sufficient evidence to submit the case to the jury on a theory of wanton behavior. Nothing in the record or the opinions of the courts below supports Wheeler's assertion that the verdict actually rested upon a finding of wantonness. Based on the instructions given at trial (App. at 60-64) and the record, it is clear that the jury could have reached its verdict based on simple negligence.

This case presents the issue of the constitutionality of the imposition of punitive damages for simple negligence as squarely as possible in light of the

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[2]The trial judge stated during argument on Lemond's motion for directed verdict, "Well, I'll be honest with you. I'm not sure that I have seen any evidence that would constitute wantonness" (R. at 1375).

procedures inherent in the Alabama system for assessing damages for wrongful deaths.

## III. THE ALABAMA SYSTEM FOR IMPOSING DAMAGES IN WRONGFUL DEATH CASES VIOLATES THE DUE PROCESS GUARANTEES OF THE FOURTEENTH AMENDMENT.

Lemond has emphasized that this "negligence/wrongful death" case is quite distinguishable from the "intentional conduct/fraud" cases previously addressed by this Court. It has never treated this as a routine case no different from other punitive damage decisions (Brief in Opposition at 17). Wheeler fails to identify any other jurisdiction which now allows, or has ever allowed, the imposition of punitive damages for simple negligence--whether such negligence results in injury or death. Wheeler fails to rebut the numerous cases cited by Lemond indicating that imposing punitive damages for negligent conduct does not pass muster under our concept of due process.

Wheeler attempts to mislead this Court by stating, "wrongful death damages are closely circumscribed by a system that this Court approved in Haslip, supra, 499 U.S. at 18-24, and that was recently strengthened in Life Insurance Co. of Georgia, supra, by the addition of even more detailed jury instructions" (Brief in Opposition at 18). However, the decision actually states: "We hold that hereafter in all cases where punitive damages are sought, excluding actions based upon wrongful death, . . . the trial shall be bifurcated in accordance with the procedure set out in Justice Houston's special concurrence in Charter Hospital of Mobile v. Weinberg, supra." Indeed, Wheeler's brief fails to disclose that wrongful

death actions are excluded from the chapter of the civil practice statutes which governs damages, and specifically punitive damages. See Ala. Code Ann. §§ 6-11-1 et seq., 6-11-20, 6-11-29.

Wheeler also asserts that the punitive damages awarded against Lemond were punitive in name only, and that they were really more in the nature of compensatory damages (Brief in Opposition at 17). He then makes the unfounded claim that "under petitioner's view there could be no damages of any kind in Alabama wrongful death actions in the absence of a showing of intentional wrongdoing" (Id. at 18).

These statements are nonsense. First, there can be no doubt that the damages imposed against Lemond were indeed punitive damages. An examination of the instructions to the jury on the damages issue removes any doubt that the damages award was reached based on the same factors which juries use in all punitive damages cases in Alabama (App. at 62-64). Second, there is nothing to preclude the Alabama courts from permitting the imposition of compensatory damages in wrongful death cases. The uniqueness of the Alabama wrongful death system is a function of the consistent misinterpretation of the Alabama wrongful death statutes. See Tatum v. Schering, 523 So. 2d 1042, 1047-63 (Ala. 1988) (Houston, J., dissenting); Rose v. Rogers, 632 So. 2d 434, 435 (Ala. 1993) (Houston, J., dissenting). Wheeler himself concedes that other jurisdictions have had no difficulty in permitting compensatory damages in wrongful death cases despite the common-law ban on such damages.

Lemond never argued that there should be no damages in wrongful death actions except where intentional misconduct has been proven. Rather, Lemond's position is that the imposition of punitive damages against a party who has been merely negligent is unconstitutional. This position is consistent with this Court's determination that such damages are constitutional if used to punish persons who have harmed others through actions which were intentional, malicious, or wanton. See TXO Production Corp., supra; Haslip, supra; Smith v. Wade, 461 U.S. 30 (1983).

Lemond does not argue against respondeat superior, which this Court addressed in Louis Pizitz Dry Goods v. Yeldell, 274 U.S. 112 (1927). A corporation is liable for the conduct of its employees. If the conduct deserves punishment then the employer is responsible. That is not the issue here. The issue is rather the Alabama scheme which mandates only punitive damages for simply negligent conduct. The $7,500 verdict in 1927 against Pizitz Dry Goods is equal to only $206,976 in 1996 based on a 5% annual index. This $3.5 million award illustrates how the due process problem has manifested itself since then.

## IV. NO OTHER JURISDICTION ALLOWS PUNITIVE DAMAGES FOR SIMPLE NEGLIGENCE.

Section IV of Wheeler's brief argues in part that Lemond's position has no merit because other jurisdictions have long recognized the propriety of imposing punitive damages for simple negligence. He then cites 13 cases dating from 1839 to 1889. Wheeler has misstated their holdings. The cases substantiate Lemond's position that in jurisdictions other than

Alabama, punitive damages could not be assessed for merely negligent acts. In Missouri Pacific Railway v. Humes, 115 U.S. 512 (1885), the Court approved the awarding of punitive damages not on the basis of simple negligence but rather on the basis of a railroad's conscious decision to ignore a statutorily imposed duty to erect fencing along its right of way to protect livestock on adjacent property. The Court stated that punitive damages were appropriately imposed "whenever malice, gross neglect, or oppression has caused or accompanied the injury complained of." Id. at 521. Equally unhelpful to Wheeler is Minneapolis & St. Louis Railway v. Beckwith, 129 U.S. 26 (1889), in which the Court approved damages in the amount of double the actual loss arising out of the death of the plaintiff's three hogs on tracks in an area which the railroad had a right to fence. The damages were not awarded for the inaction of the railroad with regard to fencing, but were imposed pursuant to a statutory provision which authorized the award of double damages against a railroad if it failed to pay for livestock killed on its tracks within 30 days of a demand. In short, the punitive damages rested on the failure to pay when requested and not on any negligence. See also, e.g., Welch v. Durand, 36 Conn. 182, 185 (1869) (plaintiff in tort case awarded expenses of litigation in addition to damages where defendant shot him and action was "wanton, reckless, without due care, and grossly negligent"); Linsley v. Bushnell, 15 Conn. 225, 236 (1842) (defendant refused to remove his wagon loaded with wood which someone else had overturned in road; when traveler was injured after hitting wagon, defendant was liable for vindictive damages because defendant's refusal was "wanton or mali-

cious"); Best v. Allen, 30 Ill. 30 (1862) (defendant in trespass case subject to punitive damages not on basis of entry, which was made in good faith, but because he willfully damaged plaintiff's goods, which he knew he had no right to do); Lake Shore & Michigan Southern Railway v. Rosenzweig, 113 Pa. 519, 544 (1886) (exemplary damages awarded where conductor forcibly removed plaintiff from train in dangerous area; such damages appropriate where there is "wilful misconduct, or that entire want of care which would raise a presumption of conscious indifference to consequences"); Whipple v. Walpole, 10 N.H. 130, 130 (1839) (jury instructed that "for ordinary neglect the plaintiff could not recover exemplary damages; but that such damages might be allowed, in the discretion of the jury, in case they believed there had been gross negligence on the part of the defendants" (emphasis in original)); Caldwell v. New Jersey Steamboat Co., 47 N.Y. 282, 297 (1872) (exemplary damages allowed where conduct was "wanton or grossly negligent," but not for "simple negligence"); Earl v. Tupper, 45 Vt. 275, 288 (1873) (plaintiff awarded punitive damages in assault case; defendant beat pregnant woman; "such damages are given to stamp the condemnation of the jury upon the acts of the defendant on account of the malicious or oppressive character of the acts").

Citing a Maryland case and an A.L.R. annotation, Wheeler further claims that punitive damages are routine in strict liability actions, and thus "it is impossible to see how the imposition of punitive damages for negligence can raise any federal constitutional issue at all" (Brief in Opposition at 22). The authority does not support the proposition for

which it was cited. American Laundry Machinery Industries v. Horan, 45 Md. App. 97, 412 A.2d 407, 419 (1980), held that while punitive damages are available in product liability cases, they may be imposed only where the facts show that the defendant exhibited "wanton or reckless disregard for the rights of others." American Laundry Machinery reversed the trial court's imposition of punitive damages against the defendant, finding that the evidence showed only simple negligence on the part of the defendant manufacturer and holding that "wanton and reckless conduct requires far more than mere negligence." 412 A.2d at 420.

The general rule in other jurisdictions allows courts to award compensatory damages for negligence and, in addition, punitive damages if a more substantial degree of conduct is proven. The Alabama scheme, which permits only punitive damages regardless of the degree of culpability, is indeed a departure from long-established practice and does not conform to the common law as it existed at the time of the adoption of the fourteenth amendment. For the reasons set out in Lemond's petition, this Court must grant certiorari in this case and conclude that the Alabama system violates due process.

Respectfully submitted,

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